UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: April 16, 2009

CBCA 888-RATE, 902-RATE, 903-RATE, 904-RATE, 905-RATE, 906-RATE, 907-RATE, 908-RATE, 909-RATE, 912-RATE, 913-RATE, 914-RATE, 915-RATE

In the Matters of AMERICAN WORLD FORWARDERS, INC. (CBCA 888-RATE); ACCELERATED INTERNATIONAL (902-RATE); AMERICAN VANPAC CARRIERS, INC. (903-RATE); CARTWRIGHT INTERNATIONAL VAN LINES, INC. (904-RATE); COVAN INTERNATIONAL, INC. (905-RATE); CLASSIC FORWARDING, INC. (906-RATE); DESERET FORWARDING INTERNATIONAL, INC. (907-RATE); FOREMOST FORWARDING, INC. (908-RATE); JET FORWARDING, INC. (909-RATE); AFI WORLD FORWARDERS, INC. (912-RATE); CAVALIER FORWARDING, INC. (913-RATE); CRYSTAL FORWARDING, INC. (914-RATE); and LOGISTICS INTERNATIONAL, INC. (915-RATE)

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VERGILIO, Board Judge.

On August 24, 2007, American World Forwarders, Inc. (claimant) filed at the Board a claim, CBCA 888-RATE, seeking review of the determination by the Audit Division of the General Services Administration that the claimant is liable to the Government for $32,338.01. On September 17, 2007, the Board received additional claims from eight different claimants challenging similar determinations of liabilities to the Government: Accelerated International, CBCA 902-RATE; American Vanpac Carriers, Inc., CBCA 903-RATE; Cartwright International Van Lines, Inc., CBCA 904-RATE; Covan International, Inc., CBCA 905-RATE; Classic Forwarding, Inc., CBCA 906-RATE; Deseret Forwarding International, Inc., CBCA 907-RATE; Foremost Forwarding, Inc., CBCA 908-RATE; and Jet Forwarding, Inc., CBCA 909-RATE. On September 18, 2007, the Board received claims from four additional claimants similarly challenging determinations of liabilities to the Government: AFI World Forwarders, Inc., CBCA 912-RATE; Cavalier Forwarding, Inc.,

CBCA 913-RATE; Crystal Forwarding, Inc., CBCA 914-RATE; and Logistics International, Inc., CBCA 915-RATE.

The claimants, each a transportation service provider, contend that the Government agreed to reimburse some of their increased costs related to delays of shipments that arose after the attacks of September 11, 2001. The claimants maintain that they incurred such costs from their agents who experienced delays at military installations while shipments were in transit between points of pick-up and delivery. The claimants state that a meeting of the minds arose from negotiations with a Government employee and is reflected in amendments to the underlying contracts. The claimants sought reimbursement for the costs as surcharges under their agreements with the Government. Although the Government initially reimbursed each claimant, upon later audit the Government concluded that the surcharges were not reimbursable as submitted. The claimants dispute the various notices of overcharge that the Government issued. Each claimant asserts entitlement to be paid for the total amount of its billed surcharges.

Each party has filed a motion for summary relief. The claimants contend that they billed in accordance with the provisions of the agreements and that the Government has not provided a viable basis to disallow payment. To the contrary, in its own motion for summary relief, the Government contends that the claimants did not bill in accordance with the agreements and that the claimants have not supported payment of the surcharges.

At this stage, in the context of cross-motions for summary relief, neither party has prevailed. No claimant has established a right to payment, either entitlement or quantum. While some of the bases relied upon by the Government to disallow payment of surcharges are not supported, the ultimate burden of proof for recovery is upon the claimants. The Government has not established that relief is precluded under the agreements.

A claimant is not entitled to reimbursement of a surcharge simply because the claimant incurred an expense, anticipated or not. Under the contracts, the claimants agreed to be reimbursed at single factor rates for the transportation of household goods and unaccompanied baggage; surcharges to the rate are recoverable only as dictated in each agreement. The present record does not establish that the surcharges for which the claimants seek reimbursement were permitted under the agreements, or that each surcharge was actually incurred for a compensable cause at a compensable amount. Similarly, the present record does establish that any surcharge may not be reimbursed.

In denying these cross-motions, the Board resolves some issues. The Government's notices of overcharge that rely upon a document issued on February 24, 2006, as the basis

for disallowance are not supported in the record. Although that document specifically restricted available surcharges, the limitations were superceded by a document dated April 11, 2006.

The claimants' conclusions regarding the binding authority of a Government employee engaged in negotiations (Mr. S. for easy reference) are not supported by the record. Each agreement specifies that it could be modified only by a given individual by letter or electronic means, and that prior practices or procedures do not influence the agreement. Not being the sole individual identified in the agreements as possessing modification authority, Mr. S.'s communications while negotiating and dealing, directly and indirectly, with the claimants, did not alter the terms of any agreement. The Government employee's authority to negotiate does not equate to a delegation from the specified individual to modify the agreement. The actual modifications to the agreements are not on their face as encompassing as the claimants maintain.

Findings of Fact

1. As may be relevant here, the claimants moved household goods (HHG) and/or unaccompanied baggage (UB) for the Government beginning on October 1, 2001. The claimants were transportation service providers (TSPs) under successive contracts with the Government. The contracts arose from agreements issued by the Government, namely the International Personal Property Rate Solicitation (IPPRS) I-13 (effective October 1, 2001), IPPRS I-14 (effective October 1, 2003), IPPRS I-15 (effective October 1, 2004), and IPPRS I-16 (effective October 1, 2005), IPPRS I-17 (effective October 1, 2006), and IPPRS I-18 (effective April 1, 2007).

2. The solicitation that became a contract or agreement in effect for two years beginning October 1, 2001, provides: "This solicitation stands alone and is not influenced by prior practices or procedures. It may be modified only by the Deputy Chief of Staff for Passenger & Personal Property, by letter or electronic means." IPPRS I-13 (Item 107.f). Subsequent agreements state: "This solicitation stands alone and is not influenced by prior practices or procedures. It may be modified only by the Assistant Deputy Chief of Staff for Operations, Transportation Services, by letter or electronic means." IPPRS I-14, I-15, I-16, I-17, I-18 (Item 107.f).

3. Payment for services was contractually established by single factor rates. A transportation single factor rate includes all land, water, and air transportation services, except for specifically identified items. Of relevance here are two categories of shipments,

one for the transportation of household goods (item 432), the other for the transportation of unaccompanied baggage (item 433). IPPRS I-13 at 4-22 (¶ 432a(4)), 4-24 (¶ 433a(3)).

4. In the initial unamended agreement, for the transportation of household goods, an exception exists to the inclusiveness of the single factor rates (i.e., surcharges are permitted) for:

> Bunker fuel charges (BSC), air fuel surcharges (100), port congestion surcharges (CON), and/or war risk surcharges (WAR), where applicable, and when actually billed to the ITGBL [international through Government bill of lading (GBL)] carrier by ocean freight carrier or air carrier pursuant to regularly filed tariff(s) with the Federal Maritime Commission. Such charges will be separately stated on the GBL and supported by prorated ocean or air carrier invoices for the actual amount.

IPPRS I-13 at 22 (¶ 432a(4)(d)). Amendment 2 to IPPRS I-13, with an effective date coincident with the effective date of the contract, changed "Federal Maritime Commission" to read "Regulatory Bodies/Commission."

5. In the initial unamended agreement, for the transportation of unaccompanied baggage, an exception exists to the inclusiveness of the single factor rates for:

> Bunker fuel charges (BSC), air fuel surcharges (100), port congestion surcharges (CON), and/or war risk surcharges (WAR), where applicable, and when actually billed to the ITGBL carrier by the ocean freight carrier pursuant to regularly filed tariff(s) with the Federal Maritime Commission. Such charges will be separately stated on the GBL and supported by ocean or air carrier invoices for the actual amount.

IPPRS I-13 at 4-24 (¶ 433a(3)(d)).

6. The agreement did not define either a port congestion surcharge (CON) or a war risk surcharge (WAR). IPPRS I-13.

7. For each of these items, the contract stated that the single factor rate will not include "[s]torage, waiting time and/or handling charges . . . caused by failure of the origin transportation officer to furnish acceptable custom documents or by refusal of customs officials to clear shipments. These charges will be billed at rates provided in this solicitation when performed by the carrier." IPPRS I-13 at 4-23 (¶ 432.b(1)), 4-25 (¶ 433.b(1)). Item

503 contains provisions for surcharges for waiting time. The provisions note that the item does not apply when waiting time is the fault of the carrier and state that free waiting time is as follows: "3 hours for direct deliveries, 1 hour for deliveries from SIT [storage-in-transit], and 1 hour for attempted pickup of HHG only." IPPRS I-13 at 5-36 (¶ 503). This language remained unchanged in the later contracts here at issue. IPPRS I-14, I-15, I-16, I-17, and I-18.

8. The service providers and Government officials discussed surcharges being incurred by the service providers when, after the attacks of September 11, 2001, delays were occurring at intermediate (other than origin or destination) ports affecting the transportation of household goods and unaccompanied baggage. Substantive discussions occurred between the president of the Household Goods Forwarders Association of America, Inc. (association president), at the behest of association members, and Mr. S., a Government employee of the Military Management Traffic Command (MTMC), the predecessor to the Surface Deployment and Distribution Command (SDDC), who retired in 2003. Mr. S. was not the Deputy Chief of Staff for Passenger and Personal Property. The association president indicated that because of tightened security and changed gates for entrance to installations, shipments were being delayed in transit; the service providers were incurring surcharges from their port agents because of the delays. Mr. S. advised that items 432 and 433 would be changed to permit reimbursement of surcharges assessed for congestion delays by aerial port agents to the transportation service providers. The association president understood that service providers were to be reimbursed under items 432 and 433 for surcharges by port agents under the port security/congestion surcharge, even when the only paper trail of the surcharges would be the invoices from the port agents. Some of the correspondence was provided by e-mail to the Deputy Chief of Staff for Passenger and Personal Property; the existing record does not substantiate that the Deputy Chief of Staff reviewed, concurred in, approved, or disapproved of the various communications of Mr. S. Declarations of Association President and of Mr. S. For example, in an e-mail exchange of October 16, 2001, between the two individuals, with copies provided to others within the Government, the association president posed a question to Mr. S., seeking guidance on how charges could be passed along to the Government:

> [W]e have received a notification from an [aerial] port agent that they will be charging a surcharge of $5.00 GCWT to cover the necessary security restrictions and detention at the gates. Our port agent is quoting the rate solicitation Item 433 (UB) pg 4-24 (d), we are unable to determine exactly how to apply this Item, any guidance we receive will be greatly appreciated.

To this, Mr. S. replied:

> [C]harges would normally be covered under port congestion, however, we will make it easier, by changing "port congestion" to "port/security congestion." The change will be made effective for 1 OCT 01 and [a named individual] will add to the I-13. We will also permit pass thru of this surcharge by the Aerial Port Agent to the ITGBL carrier for billing under "port/security congestion".

Association President Declaration, Attachment 1.

9. During the discussions, the Government amended IPPRS I-13, with an effective date of October 1, 2001 (i.e., coincident with the effective date of the contract), by written Amendment 3. The explanation of change for item 432a (for household goods) states that the "item now includes security surcharges and authorizes surcharges from port agents." The explanation of change for item 433a (unaccompanied baggage) states that the "item now includes security surcharges and authorizes surcharges from port agents and air carriers." IPPRS I-13, Amendment 3. With the amendment, the pertinent surcharge provision became identical (but for the use of the word "prorated" in item 432a) for each item:

> Item 432a(4)(d):
>
> Bunker fuel charges (BCS), air fuel surcharges (100), port security/congestion surcharges (CON), and/or war risk surcharges (WAR), where applicable, and when actually billed to the ITGBL carrier by ocean freight carrier, air carrier or port agent pursuant to regularly filed tariff(s) with the Regulatory Bodies or Commissions. Such charges will be separately stated on the GBL and supported by prorated ocean, air carrier or port agent invoices for the actual amount.
>
> Item 433a(3)(d):
>
> Bunker fuel charges (BCS), air fuel surcharges (100), port security/congestion surcharges (CON), and/or war risk surcharges (WAR), where applicable, and when actually billed to the ITGBL carrier by ocean freight carrier, air carrier or port agent pursuant to regularly filed tariff(s) with the Regulatory Bodies or Commissions. Such charges will be separately stated on the GBL and supported by ocean, air carrier or port agent invoices for the actual amount.

IPPRS I-13 (revised through Amendment 3). The amendment did not define either the CON or the WAR surcharge.

10. The above-quoted language for these items, 432a and 433a, along with the lack of accompanying definitions for CON and WAR, did not change in IPPRS I-14. For IPPRS I-15, the only changes were the replacement of "carrier" with "Transportation Service Provider"; IPPRS I-16 carried over that identical language. Thus, substantively, the language remained unchanged through March 1, 2006.

11. In 2005 and 2006, the Government began to question some of the surcharges submitted by the claimants. Association President Declaration at 5 (¶ 10). From the disputed notices of overcharge, the claimants sought payment for surcharges coded as war risk (WAR) or port security/congestion (CON).

12. On February 24, 2006, the SDDC issued a document stating that the SDDC has recognized the need to provide a clearly defined description, as well as to clarify the usage of surcharge items codes, including those for war risk (WAR), port/terminal security handling (COF), and port congestion (CON). The document contains definitions, specifies application, and details responsibilities of the Personal Property Shipping Offices and of the service providers. The statement indicates that the definitions and notes on application have an effective date of March 1, 2006, and will be incorporated in the next agreement, IPPRS I-17. Three definitions are of relevance here:

> **War Risk Surcharge (WAR)** -- Insurance coverage for loss of goods resulting from any act of war or as a result of the vessel "entering" the war risk area when billed by the ocean/air TSP. This charge is only applicable to areas deemed "war risk" areas, as provided for on the SDDC website . . . . This surcharge is applicable to codes of service 2, 3, 4, 6, 7, and 8.
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> **Port/Terminal Security Handling Surcharge (COF)** -- An extra charge that is billed to the TSP for security of their cargo while at the port of embarkation/debarkation. This surcharge is applicable to codes of service 2, 3, 5, 6, 7, and 8.
>
> **Port Congestion Surcharge (CON)** -- An extra charge that is billed to the TSP for controlling the congestion of vessels entering/departing the port. This surcharge is applicable to codes 2, 3, 4, and 7.

Regarding the application of the referenced surcharges, the document specifies:

> **Note 1**: Air fuel, bunker, War Risk, Port/Terminal Security Handling, and Port Congestion surcharges are not applicable on shipment codes of service T, 5, and J.
>
> **Note 2**: Surcharges, other than those identified above, will be considered on a case-by-case basis with reimbursement decision resting at the sole discretion of the Surface Deployment and Distribution Command. With the exception of fuel related surcharges and unless otherwise stated, all surcharges are meant to be temporary in nature in and [sic] until the TSP has been provided official notification to incorporate such additional fees into their single factor rate.

Claimants' Motion, Attachment 10.

13. In a document dated March 25, 2006, the SDDC documented clarifications to the recently issued publication; i.e., that discussed in Finding 12. The relevant clarifications state:

> 1. The definitions and applications were clarifications to the current International Personal Property Rate Solicitation. The clarification provided guidance as to how TSPs should have always billed and should continue to bill the listed surcharges. These clarifications will be incorporated into the next released rate solicitations. The March 1, 2006, effective date was applicable to date of publishing only, as SDDC has frequently been asked when a document was posted to our website.
>
> . . . .
>
> 4. SDDC has reviewed the feedback and invoices provided from industry and ha[s] incorporated codes T, J, and 5 into billing code COF.
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> . . . .
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> 8. TSP's should only be invoicing for WAR according to the "**JWC HULL War, Strikes, Terrorism and Related Perils**." SDDC will provide updates to this list, as they occur. Invoices submitted that fall outside of the aforementioned listing are erroneous. Repetitious erroneous billing will result in letters of warning or other action(s), as SDDC deems appropriate.

> 9. CON may be billed by TSP's due to delays entering the port, in addition to extra charges billed to control the congestion of vessels entering/departing the port.
>
> 10. If there have been charges denied in the past, that were valid and fall under our recent clarification, TSP's have the ability to rebill those line items. When doing so, request that TSP's add a note in CWA [Central Web Application] to explain the rebilling.

Claimants' Motion, Attachment 11.

14. In a document dated April 11, 2006, the SDDC provided further clarifications. The clarifications include the following (some unchanged and some changed from those of March 25):

> 1. The definitions and applications were clarifications to the current International Personal Property Rate Solicitation. The clarification provided guidance as to how TSPs should have always billed and should continue to bill the listed surcharges. These clarifications will be incorporated into the next released rate solicitations. The March 1, 2006 effective date was applicable to date of publishing only, as SDDC has frequently been asked when a document was posted to our website.
>
> . . . .
>
> 4. SDDC has reviewed the feedback and invoices provided from industry and have incorporated codes T, J, and 5 into billing code COF and CON.
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> . . . .
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> 7. TSP's should only be invoicing for WAR according to the "**JWC HULL War, Strikes, Terrorism and Related Perils**." SDDC will provide updates to this list, as they occur. Invoices submitted that fall outside of the aforementioned listing are erroneous. Repetitious erroneous billing will result in letters of warning or other action(s), as SDDC deems appropriate.

8. CON may be billed by TSP's due to delays entering the port, in addition to extra charges billed to control the congestion of vessels entering/departing the port.

9. If there have been charges denied in the past, that were valid and fall under our recent clarification, TSP's have the ability to rebill those line items. When doing so, request that TSP's add a note in CWA [Central Web Application] to explain the rebilling.

This document specifies that the new definitions and application notes become effective March 1, 2006, and will be incorporated into the next agreement, IPPRS I-17. The definitions of relevance to resolving these claims state:

> **War Risk Surcharge (WAR)** -- Insurance coverage for loss of goods resulting from any act of war or as a result of the vessel "entering" the war risk area when billed by the ocean/air TSP. This charge is only applicable to areas deemed "war risk" areas, as provided for on the SDDC website . . . . This surcharge is applicable to codes of service 1, 2, 3, 4, 6, 7, and 8.
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> **Port/Terminal Security Handling Surcharge (COF)** -- An extra charge that is billed to the TSP for security of their cargo while at the port of embarkation/debarkation. This surcharge is applicable to codes of service 1, 2, 3, 4, 5, 6, 7, 8, T, and J.
>
> **Port Congestion Surcharge (CON)** -- An extra charge that is billed to the TSP for controlling the congestion of vessels entering/departing the port. This surcharge is applicable to codes 1, 2, 3, 4, 5, 7, T, and J.

Regarding the application of the referenced surcharges, the document specifies:

> **Note 1**: Air fuel, bunker, War Risk surcharges are not applicable on shipment codes of service T, 5, and J. These charges are all billed by the ocean/air TSP and this service is performed by the U.S. Government, in codes of service T, 5, and J.
>
> **Note 2**: Surcharges, other than those identified above, will be considered on a case-by-case basis with reimbursement decision resting at the sole discretion of the Surface Deployment and Distribution Command. With the exception of fuel related surcharges and unless otherwise stated, all surcharges are meant

> to be temporary in nature in and [sic] until the TSP has been provided official notification to incorporate such additional fees into their single factor rate.

15. Effective October 1, 2006, IPPRS I-17 and amendment one defined "surcharge" and incorporated the definitions for WAR, CON, and COF (under item 252); and added the billing code COF for port security surcharges in items 432 and 433, as follows:

> Item 252. **Surcharge:** An extra fee, levied to a shipment, paid by the transportation service provider and sometimes reimbursed by the U.S. Government. Surcharge reimbursement is considered on a case-by-case basis with reimbursement decision resting at the sole discretion of the Surface Deployment and Distribution Command. Specific surcharge definitions are provided below:
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> . . . .
>
> **c. War Risk Surcharge (WAR)** -- Insurance coverage for loss of goods resulting from any act of war or as a result of the vessel "entering" the war risk area when billed by the ocean/air TSP. This charge is only applicable to areas deemed "war risk" areas, as provided for on the SDDC website . . . . This surcharge is applicable to codes of service 1, 2, 3, 4, 6, 7, and 8.
>
> d. **Port/Terminal Security Handling Surcharge (COF)** -- An extra charge that is billed to the TSP for security of their cargo while at the port of embarkation/debarkation. This surcharge is applicable to codes of service 1, 2, 3, 4, 5, 6, 7, 8, T, and J.
>
> e. **Port Congestion Surcharge (CON)** -- An extra charge that is billed to the TSP for controlling the congestion of trucks/vessels entering/departing the port. This surcharge is applicable to codes 1, 2, 3, 4, 5, 7, and T, J.

IPPRS I-17 at 2-6 (with change 1).

> Item 432a(4)(d):
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> Bunker fuel charges (BCS), air fuel surcharges (100), port security surcharges (COF), port congestion surcharges (CON), and/or war risk surcharges (WAR), where applicable, and when actually billed to the ITGBL Transportation Service Provider by ocean freight Transportation Service

> Provider, air Transportation Service Provider or port agent pursuant to regularly filed tariff(s) with the Regulatory Bodies or Commissions. Such charges will be separately stated on the GBL and supported by prorated ocean, air carrier or port agent invoices for the actual amount.

IPPRS I-17 at 4-23.

Item 433a(3)(d):

> Bunker fuel charges (BCS), air fuel surcharges (100), port security surcharges (COF), port congestion surcharges (CON), and/or war risk surcharges (WAR), where applicable, and when actually billed to the ITGBL Transportation Service Provider by ocean freight Transportation Service Provider, air Transportation Service Provider or port agent pursuant to regularly filed tariff(s) with the Regulatory Bodies or Commissions. Such charges will be separately stated on the GBL and supported by ocean, air carrier or port agent invoices for the actual amount.

IPPRS I-17 at 4-25.

16. The same provisions were carried over into the next contract (with a correcting transposition at the end of the CON definition). IPPRS I-18 at 2-6, 4-23, 4-25.

17. Because the Government contends that claimed surcharges potentially could and can be reimbursed as waiting times under item 503, to the extent that a surcharge reflects a wait in excess of three hours of free waiting time, the specifics of item 503 are addressed beyond what is in Finding 7. The parties reference an SDDC issuance, Waiting Time Issue (3141). The document is designated as providing policy regarding delays incurred by a carrier due to the security requirements of an installation, and addresses the use of waiting time and billing for international shipments under item 503. The document itself is undated. Neither party attempts to attribute a date to the document, which can be found on the SDDC website, also without a discernable date of creation or issuance. The document must have been issued after January 1, 2004, when the SDDC was created as the successor to the MTMC. Also, because the document uses the word "carrier" instead of the phrase "Transportation Service Provider" implemented as of October 1, 2004, with agreement I-15, it appears that SDDC issued the document at some time during the first nine months of 2004. The document states, regarding international shipments:

> a. When a carrier is delayed at the gate of an installation, through no fault of its own, the carrier shall expend the applicable free waiting time allowed (3 hours for direct deliveries and 1 hour for shipments from SIT or attempted pickups) under the International Personal Property Rate Solicitation (IPPRS). The carrier must immediately notify the PPSO [personal property shipping office] of the potential delay upon arriving at the gate or at the line for entry to the installation. Prior to the expiration of the applicable free waiting time, the carrier must contact the responsible PPSO to obtain further instructions:
>
> (1) A carrier instructed to continue delivery of the shipment or to proceed in picking up a shipment shall be paid waiting time only when the applicable waiting time has expired. For example, a carrier delivering shipment from SIT who is delayed at the gate for 2 hours, through no fault of its own, is entitled to payment of 1 hour waiting time under the procedures contained in Item 503 of the IPPRS. Paid waiting time will begin once the carrier has notified the PPSO and the free waiting time has elapsed.
>
> (2) A carrier instructed not to continue with a shipment pickup shall be paid for attempted pickup only, under the procedures contained in Item 511 of the IPPRS.
>
> (3) A carrier instructed to return the shipment to the storage facility shall be paid for attempted delivery only, under the procedures contained in Item 510 of the IPPRS.

Claimants' Motion for Summary Relief, Attachment 12. Item 510 relates to attempted delivery to residence from SIT. Item 511 relates to attempted pickup at and delivery to a residence.

18. For transportation services rendered beginning in October 2001 and continuing for several years thereafter, the claimants submitted bills to the Government, claiming payment for surcharges with the WAR, CON, or COF codes under items 432 (household goods) and 433 (unaccompanied baggage). The claimants state that they billed to the Government as surcharges, on a pass-through basis without markup, charges the claimants incurred from and paid to their agents for delays in shipments to or from military air terminals. Between October 2001 and April 2006, the Government reimbursed the claimants for the surcharges.

19. In performing post-payment oversight functions, the General Services Administration (GSA) reviewed records and issued notices of overcharge of specific dollar amounts. The Government has deemed the surcharges as submitted not reimbursable and has obtained repayments or taken offsets. The notices in the present record fall into two main categories. In the first category, the GSA relies upon limitations in the SDDC issuance of February 24, 2006, Finding 12. This category has two subcategories of surcharges addressed: one relates solely to WAR surcharges for code J shipments; the other relates collectively to surcharges for WAR, COF, and CON, applied to codes 5, J, and T. These notices were issued in 2006, 2007, and 2008. The various agreements described the three codes of services identified (5, J, and T) exactly or substantively as follows under item 403:

> Code 5 -- International Door-to-Door Container Government Ocean Transportation: Movement of HHG in containers whereby a carrier provides complete through service from origin residence to the destination residence, EXCEPT the Government provides ocean (JTMO) transportation via designated military ocean terminals.
>
> Code J -- Land-Air (AMC)-Land Baggage: The movement of UB whereby a carrier provides packing and pickup at origin, surface transportation to the designated AMC aerial port, surface transportation from a designated aerial port to final delivery point, and cutting of the banding and opening of the box(es) when delivery to residence is completed. AMC will provide origin and destination terminal services and air transportation between aerial ports. When unpacking services are ordered, see Chapter V. Additional requirements included in specific terms and conditions for Code J shipments are in Chapter XIII.
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> Code T -- International Door-to-Door (AMC): Movement of HHG in containers whereby a carrier provides complete through service from origin residence to the destination except the Government provides air (AMC) transportation via designated military airports.

The second category relates to item 433(d) shipments and an asserted need for filed tariffs. These notices were issued in 2008. For these disputed notices of overcharge, the existing record does not indicate the specific dates of shipment or when the Government paid the initial bills.

20. By way of example, in the first category, first subcategory, the notices addressing WAR surcharges state: "This Notice of Overcharge is issued to recover charges

that were erroneously billed by your company for WAR, WAR RISK applied to Coded J shipments." The notice continues:

> The Surface Deployment and Distribution Command (SDDC) issued a letter dated February 24, 2006, clarifying the description and application of these surcharges. The letter states in Note 1 that, "Air fuel, bunker, War Risk, Port/Terminal Security Handling, and Port Congestion surcharges are not applicable on shipment codes of service T, 5, and J." Further, SDDC refers to this statement as a clarification of the billing procedure, not a change. In accordance with this explanation of the appropriate billing of surcharges, the Audit Division is requesting a refund of excess charges related to the improper application of surcharges to Codes T, 5, and J shipments.

21. In the first category, second subcategory, the notices state:

> This Notice of Overcharge is issued to recover charges that were erroneously billed by your company for War Risk Surcharges (WAR), Port/Terminal Security handling Surcharges (COF), and Port Congestion Surcharges (CON), applied to codes T, 5, and J shipments.
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> The Surface Deployment and Distribution Command (SDDC) issued a letter dated February 24, 2006, clarifying the description and application of these surcharges. The letter states in Note 1 that, "Air fuel, bunker, War Risk, Port/Terminal Security Handling, and Port Congestion surcharges are not applicable on shipment codes of service T, 5, and J." Further, SDDC refers to this statement as a clarification of the billing procedure, not a change. In accordance with this explanation of the appropriate billing of surcharges, the Audit Division is requesting a refund of excess charges related to the improper application of surcharges to Codes T, 5, and J shipments.

22. In the second category, the notices state:

> This Notice of Overcharge is issued to recover monies billed and collected erroneously by the carrier for WAR/CON/COF charges.
>
> GSA has concluded the carrier has failed to meet the basic provisions of Item 433(d) of the International Rate Solicitation:

(1) that the charges are to be based on Filed Tariffs with Regulatory Bodies or Commissions:
(2) Separately stated and supported by invoices that reflect the rates published in a Filed Tariff.

An optional and appropriate means of compensation is provided in Item 503 of the International Rate Solicitation. The carrier must furnish documentation that substantiates:

(1) that the shipment was delayed at the APOE/APOD [aerial port of embarkation/ debarkation]
(2) that the responsible PPSO authorized waiting time

DD Form 619/619-1 is required and must be submitted, indicating the total waiting time.

Discussion

The Board resolves these cases pursuant to statute, 31 U.S.C. § 3726(i)(1) (2006), and a delegation of authority from the Administrator of General Services to this Board. Board rules specify that the "burden is on the claimant to establish the timeliness of its claim, the liability of the agency, and the claimant's right to payment." Rule 301(b) (48 CFR 6103.301(b) (2008)).

With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude the entry of summary relief, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

Given the present record and the cross-motions for summary relief, the Board concludes that the claimants have not demonstrated entitlement to payment of any surcharge in any specific amount and the Government has not demonstrated that any claimant is precluded from being reimbursed for any surcharge in any given amount. The parties have presented broad arguments, largely without regard to the timing of the incurred surcharges and the language of the agreement in effect at that time.

Claimants' motion

In seeking summary relief, the claimants maintain entitlement as a matter of law to the reimbursement of all surcharges relating to alleged delays that the Government has placed in dispute. In particular, the claimants seek a refund of all monies offset by the Government and repayments made by the claimants and a determination that the notices of overcharge are improper. "The monies claimants seek to recover are surcharges for amounts charged by their port agents for delays in accessing domestic military aerial terminals due to congestion (CON) or port security measures (COF) during the transportation of shipments for the military of household goods . . . or unaccompanied baggage[.]" Claimants' Motion at 1.

A premise underlying the argument of the claimants is that after the parties recognized that there would be delays resulting from the attacks of September 11, 2001, the Government amended the agreement, effective October 1, 2001, to authorize reimbursement of the surcharges here in dispute. The amendment permits reimbursement of "port security/congestion surcharges" expanded from "port congestion surcharges." Finding 9. In particular support, the claimants reference the exchanges involving, and affidavits of, the association president and Mr. S. Finding 8.

The claimants contend that these disputes may be resolved based upon the oral and written communications of Mr. S., a Government employee engaged in negotiations with the claimants, or more specifically the association president. The claimants rely upon *Stevens Van Lines, Inc. v. United States*, 80 Fed. Cl. 276, 280-81 (Fed. Cl. 2008), in which that court found that two individuals who negotiated with transportation service providers had implied actual authority to guarantee that the Government would reimburse a given fee. In these cases at the Board, each of the agreements specifically states who (either the Deputy Chief of Staff or the Assistant Deputy Chief of Staff) could modify the agreement and how that must be done (by letter or electronic means). Finding 2. The specificity in the contractual language eliminates the application of implied authority principles. A service provider could not reasonably rely upon the written or oral communications of someone other than the official designated in the agreement. *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1346 (Fed. Cir. 2007) ("We cannot conclude that [an individual] had implied authority to

direct changes in the contract in contravention of the unambiguous contract language."). The claimants have not established the authority of Mr. S. to alter the terms of any contract, much less to guarantee that a given surcharge would be reimbursed. Although a negotiator for the Government, Mr. S. was not the Deputy Chief or Assistant Deputy Chief of Staff for Operations. The oral understandings between Mr. S. and the claimants, or between Mr. S. and the association president, do not directly impact upon the resolution of these disputes. Further, given the limited authority of Mr. S., his understandings, actions, and communications do not serve as a basis by themselves for estoppel against the Government.

In seeking summary relief, the claimants urge the Board to construe the surcharge provisions so as to give effect to the intent and purpose of reimbursing service providers for charges not included in single factor rates. Claimants' Motion at 6, 10. The claimants intended to be reimbursed for delay-related costs incurred, and seemingly recognized that reimbursement may not occur without an amendment to the language of the agreement. The intent of the claimants has not been demonstrated as the intent of MTMC or SDDC. Any intent or purpose Mr. S. expressed during his negotiations is not automatically the intent of the Government. He was not in a position to express the Government's intent. The language of the amendments is not as encompassing as the claimants contend.

The actual language of the agreement, as it read effective on October 1, 2001, with Amendment 3, and thereafter, does not permit the claimants to demonstrate entitlement and quantum in the posture of summary relief. The agreement does not state that any submitted surcharge with a code of WAR, CON, or COF will be reimbursed. That is, entitlement to any given requested amount of reimbursement is not guaranteed; the provisions do not remove oversight and audit protections available to the Government.

Moreover, the agreement specifies that the surcharges may be reimbursed "when actually billed to the ITGBL carrier by ocean freight carrier, air carrier or port agent pursuant to regularly filed tariff(s) with the Regulatory Bodies or Commissions. Such charges will be separately stated on the GBL and supported by prorated ocean, air carrier or port agent invoices for the actual amount." Finding 9. The claimants contend that no such tariffs were filed with bodies or commissions, such that the only reasonable reading of the language could not require a filing that was not occurring. Claimants' Motion at 6. The claimants fail to address or recognize that Amendment 2 to the agreement revised the sentence addressing regularly filed tariffs for surcharges relating to the shipment of household goods. Finding 4. The actual language of the agreement, with the requirement for regularly filed tariffs, provides for a measure of regularity and potential oversight that is absent from the reading urged by the claimants. At this summary relief stage, the interpretation urged by the

claimants, which is contrary to the language of the agreement, is not apparent as the one to be adopted. The Board denies the motion of the claimants.

Government's motion

The Government moves for summary relief, contending that each surcharge billed by the claimants under codes for war risk (WAR), port/terminal security (COF), or port congestion (CON) under International Personal Property Rate Solicitations (IPPRSs) I-13, I-14, I-15, and I-16, is not payable because none of the codes permits a service provider to be reimbursed for waiting time incurred by a port agent. In support, the Government references the written guidance and definitions dated April 11, 2006, Finding 14. Government's Motion at 1-2. Further, the Government contends that an appropriate billing mechanism exists within each agreement under item 503, waiting time. The Government relies upon the SDDC issuance, Finding 17, that the Government describes as the only written guidance that SDDC has issued concerning billing for increased waiting time. The Government asserts that, because no claimant submitted a request for payment under item 503, and because each of the requests under WAR, COF, or CON is inappropriate, the notices of overcharge must be upheld. Government's Motion at 2-3.

The April 11, 2006, issuance, containing guidance and definitions, is not dispositive regarding actions prior to its issuance. While the document may represent the views of the issuing body at the time of its issuance, the record does not make those views dispositive for interpretation purposes for any time prior to its issuance. The Government has not established, at this stage, that each disputed surcharge arose after the date of issuance of the guidance or that any surcharge may not be reimbursable under the applicable agreement, either on the basis of entitlement or amount.

Regarding waiting time, the Government has not demonstrated that the issuance of 2004 is dispositive for interpretation purposes for any time prior to its issuance. From the issuance of the document and thereafter, the facts have not been developed at this stage to demonstrate that the reimbursement of any submitted surcharge would be impacted by the waiting time item. Through the lack of facts and particulars in the record for summary relief, the Board cannot conclude that the alleged delays reflect a waiting time at the gate of a facility, or that item code 503 precludes reimbursement under item codes 432 or 433 for a CON surcharge.

Because the Government has not demonstrated that any requested surcharge is not reimbursable, the Board denies the Government's motion for summary relief.

Further analysis

Under the agreements, the claimants shipped household goods and unaccompanied baggage. Compensation was based upon single factor rates as supplemented by surcharges only for specified items. With the rate arrangement, the contracts placed risks upon the claimants for surcharges they incurred that were not compensable under the contracts.

Following September 11, 2001, security measures at intermediate ports caused delays. The scope, extent, and duration of any particular delay or delays in general, are not established in the existing record. The claimants were billed by their agents for what the claimants contend were costs that the agents incurred as a result of delays at intermediate ports. The existing record establishes neither the costs incurred by the agents nor the method of billing any such cost (e.g., initially item 432 required the support of prorated agent invoices, Finding 9).

Upon receiving bills from their agents for delay-related costs, the claimants (directly and through the association president) engaged in discussions with the Government, particularly Mr. S., regarding compensation for their additional costs. The Government modified the agreements, effective October 1, 2001. At this stage, the claimants have posited an interpretation of the modified language that permits the reimbursement of substantiated (no surcharge has yet been substantiated upon this record) surcharges relating to delays; however, the interpretation does not give meaning to the "regularly filed tariff" limitation of the provision. The Government's position, which seems to limit reimbursement of congestion related surcharges to those reflecting wait times in excess of three hours, renders superfluous the language of the various amendments to the agreements. The Government's interpretation is consistent with the language in the agreement prior to any amendments and without regard to any of the discussions and negotiations.

With the burden of proof upon the claimants, the notices of overcharge deserve specific comment. The claimants correctly conclude that each Government notice of overcharge, Findings 20 and 21, that relies upon the issuance of February 24, 2006, Finding 12, as a basis to disallow a surcharge is not supported given the subsequent, superceding issuances of March and April, Findings 13, 14.

The April 2006 issuance, with an effective date of March 1, 2006, contains note 2. The parties have not focused upon the note. Two aspects of the note merit comment. First, the note states that surcharges, other than those identified, "will be considered on a case-by-case basis with reimbursement decision resting at the sole discretion of the Surface Deployment and Distribution Command." Finding 14. If, as the Government contends, the

surcharges here in dispute fall outside of those identified in the issuance, then one would expect the record to include a statement by the appropriate official at SDDC exercising the sole discretion identified. A similar grant of sole discretion is found in the definition of "surcharge" in agreement I-17, Finding 15. The parties have yet to address whether the provision is relevant and any particulars.

Second, note 2 states that surcharges are meant to be temporary in nature until the service provider "has been provided official notification to incorporate such additional fees into their single factor rates." Finding 14. The summary relief record does not indicate if and when the referenced official notification was provided, and lacks an explanation regarding the applicability or inapplicability of the language.

Apart from note 2, the guidance in the issuance of April 11, 2006, establishes (and puts the claimants on notice of) the SDDC's position as of March 1, 2006. The guidance suggests that analysis must be broken into the two periods, one prior to that date and one on and after that date. To the extent applicable, the issuance regarding waiting times and item 503, Finding 17, suggests a further division of the analysis with two periods, that prior to and with the guidance. Details are required to resolve these disputes.

At this stage, few conclusions can be reached upon the existing record. As of March 1, 2006, definitions became effective in the application of the agreement. Of relevance here is the issuance of April 11, 2006, which superceded earlier issuances. Finding 14. Each claimant maintains that it is entitled to be reimbursed for surcharges submitted with one of three codes, WAR, CON, and COF, said to reflect costs (without mark-up) incurred by the claimant from agents who were delayed during the shipment of household goods or unaccompanied baggage.

For the period on and after March 1, 2006, when and if incurred, no claimant has established a factual predicate to be paid for any surcharge submitted with a WAR or COF code. By definition, the WAR code reflects a surcharge for insurance coverage within a war risk area. By definition, the COF code reflects a charge for the security of cargo while at the port of embarkation/debarkation. No claimant has established that any disputed surcharge potentially could be reimbursed under either the WAR or COF code. Accordingly, the Government should not have reimbursed any surcharge coded as WAR or COF within this period; to be reimbursed now a claimant would have to demonstrate that it is entitled to payment on a basis different from the defined codes. What remains for the parties to address are surcharges submitted under the CON code.

No claimant has established that it is entitled to reimbursement for any given surcharge under the terms and conditions of the applicable agreement. Similarly, the Government has not established that a claimant is precluded from receiving payment for any particular surcharge.

Decision

The Board **DENIES** each motion for summary relief.

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JOSEPH A. VERGILIO
Board Judge